6

No. 91-1513

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF THE TREASURY AND MITCHELL A. LEVINE, ASSISTANT COMMISSIONER,

Petitioners,

v.

GEORGE FABE, SUPERINTENDENT OF INSURANCE, STATE OF OHIO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LEWIS MELAHN IN SUPPORT OF RESPONDENT

THOMAS W. MCCARTHY, III
JAMES C. OWEN
MCCARTHY, LEONARD, KAEMMERER, OWEN, LADERMAN & LAMKIN
16141 North Outer 40 Drive, Suite 300
Chesterfield, MO 63017

*W. DENNIS CROSS
BRUCE E. BATY
MORRISON & HECKER
2600 Grand Ave.
Kansas City, MO 64108
(816) 691-2600

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

Statutes

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 91-1513

In The

Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF THE TREASURY AND MITCHELL A. LEVINE, ASSISTANT COMMISSIONER,

Petitioners,

v.

GEORGE FABE, SUPERINTENDENT OF INSURANCE, STATE OF OHIO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LEWIS MELAHN IN SUPPORT OF RESPONDENT

INTERESTS OF THE AMICUS CURIAE

Lewis Melahn is the Director of the Missouri Department of Insurance and the Receiver for Missouri-chartered Transit Casualty Company. Transit received its charter in 1945. In January 1985, at the direction of the Department, it stopped issuing new policies. It was declared insolvent in November 1985 and placed in receivership on December 3, 1985, by order of the Circuit Court of Cole County, Missouri. With billions of dollars in

liabilities, Transit is one of the largest insurance company receiverships in American history, and has been referred to in a congressional subcommittee report as "the Titanic of Insolvencies."[1]

Although its management was changed by the appointment of the Receiver, the business of Transit is not and has not been significantly different since the institution of the receivership than it was before. Transit operates out of the same offices as before the receivership, and Transit's employees perform most of their pre-receivership functions, including the adjustment and payment of claims under existing policies. One could walk into Transit's offices today and be unable to distinguish it from any other insurance business. The only part of the business of insurance Transit is not engaged in is the issuance of new policies, an activity it ceased months before the appointment of the Receiver.

The Transit receivership is governed by the Missouri Insurance Code, R.S.Mo. chapter 375, which also governs Missouri-chartered insurance companies that are not in receivership. The State of Missouri began regulating the business of insurance in 1845. In 1869 it enacted a comprehensive insurance code, and has since reenacted it in various forms, most recently in 1991. It is "an exclusive code for the insurance business, including the course to be followed in the distribution of the assets of a dissolved company among claimants and others entitled thereto,

[1] Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 101st Cong., 2d Sess., Failed Promises – Insurance Company Insolvencies 31 (Comm. Print 1990) ("Failed Promises").

and *excluding the application of statutes which might seem at first blush to be in conflict with any section of the Insurance Code.*" *O'Malley v. Prudential Casualty & Surety Co.*, 80 S.W.2d 896, 897 (Mo. App. 1935) (emphasis added). The purpose of the Code is "to regulate the insurance business from beginning to end, not alone in the case of the solvency, but in the case of the insolvency of the company as well." *Id.* Petitioners' argument that the administration of insurance company insolvencies is not part of the "business of insurance" subject to the exclusive regulation of the states, therefore, is directly contrary to long-standing Missouri law. It is also contrary to Missouri's understanding of the power of the states to regulate such insolvencies and their traditional role in doing so.

The effect of accepting petitioners' argument would not be limited to preemption of state priority schemes. If the Court holds that state laws governing insurance company receiverships are preempted by the federal priority statute, it will be argued that they are also preempted by other federal statutes of general application, notwithstanding the states' enactment of exclusive codes governing the conduct of such receiverships. Such arguments, moreover, will be made not only by the federal government but by any claimant that believes its interests would be better served in a particular situation by application of some federal statute than by application of the state insurance code.[2]

[2] A recent example is the decision of the Ninth Circuit Court of Appeals in *Bennett v. Liberty Nat'l Fire Ins. Co.*, No. 91-35292, 1992 WL 150985 (9th Cir. July 6, 1992), holding that the Federal Arbitration Act takes precedence over state-prescribed

Missouri, like all other states, has enacted a comprehensive legislative scheme that regulates insurance companies from cradle to grave. Thus the Missouri Insurance Code governed the issuance of Transit's charter to begin operations in 1945. It dictated the amount of capital Transit was required to maintain, regulated the kinds of risk it could insure, and governed its discharge of its claims handling responsibilities. After the Missouri Department of Insurance determined Transit to be insolvent in 1985, the Insurance Code continued to govern its affairs. The Code provided for new management for Transit in the form of a Receiver, required the Receiver to marshal Transit's assets, and directed him in the liquidation and distribution of those assets among various categories of claimants, including claims under policies issued by Transit.

The Receiver has a vital interest in being allowed to continue to conduct the Transit receivership, and to conduct other receiverships to which he may be appointed,

procedures for the resolution of disputed claims in insurance company receiverships. Arbitration clauses are common in contracts of insurance and reinsurance, and enforcement of such clauses prior to insolvency usually does not conflict with state insurance codes. It is not hard to imagine cases, however, in which judicial orders compelling the receiver to arbitrate would conflict with the claim resolution procedures established by state law. Insurance codes and arbitration statutes adopted by the states can reconcile the two procedures, defining the circumstances, if any, in which arbitration may be compelled in the context of an insurance company insolvency. If the Federal Arbitration Act is held to preempt state law in this regard, however, the potential for disruption of state regulatory schemes is substantial.

subject only to the requirements of the Missouri Insurance Code. Attempts to impose various provisions of federal statutes on insurance company receiverships could seriously impede their administration and undermine the public policy behind exclusive state regulation of the business of insurance. The Receiver's experience with the Transit receivership places him in a position to provide the Court with a unique perspective on the implications of the parties' arguments to the conduct of insurance company liquidations.

SUMMARY OF ARGUMENT

In their statement of the question presented and thereafter throughout their brief, petitioners treat as established without argument the proposition that, unless state insurance liquidation statutes are laws "regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, they are preempted by the federal priority statute, 31 U.S.C. § 3713(a)(1)(A). By doing so, they avoid discussing the stringent requirements this Court's opinions have imposed on those who argue that federal statutes preempt state law. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 115 L.Ed.2d 532 (1991).[3] They

[3] All preemption cases " 'start with the basic assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Wisconsin Public Intervenor*, 115 L.Ed.2d at 543 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4706 (U.S. June 24, 1992); *Gregory v. Ashcroft*, 115 L.Ed.2d 410, 424 (1991).

also attempt to reduce the preemption question to a narrow issue of statutory construction, and to base that construction on cases that construed McCarran-Ferguson not in the preemption context but as an exemption to the federal antitrust laws. Thus they argue that state law should be given extraordinarily narrow scope in a field in which Congress has expressly left state law supreme.

Long before the McCarran-Ferguson Act affirmed that the business of insurance was subject to exclusive state regulation, the states exercised unquestioned exclusive authority in that area. Although the federal priority statute has been on the books for two hundred years, this Court has never held, and until recently no court has held, that it preempted state laws governing insurance company insolvencies.

Regulation of insurance company insolvencies has traditionally and uniformly been regarded as an integral part of the states' regulation of the business of insurance. It is impossible to separate regulation of the obligations contained in insurance policies from regulation of the insurers' performance of those obligations. Receivers must perform those obligations in the case of insolvency; and in doing so they, like the companies in whose shoes they stand, are subject to the exclusive regulation of state law. Petitioners' argument to the contrary mistakenly relies on cases in which this Court has construed the "business of insurance" language, not as an expression of congressional intent regarding preemption, but in the very different context of a claimed exemption from the federal antitrust laws. It also ignores this Court's definition of the "business of insurance", adopted even in the

antitrust exemption context, which includes the "enforcement" of insurance contracts as well as the issuance of policies.

Not only is there no clear expression of an intent on the part of Congress to preempt state laws governing insurance company receiverships, but McCarran-Ferguson is a clear expression of contrary intent. That statute, enacted in 1945 in response to this Court's ruling the previous year that the business of insurance was subject to federal regulation under the commerce clause, reaffirmed the states' exclusive role in the area of insurance company regulation. The statute specifically provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance." Because state insurance codes are undeniably laws enacted for that regulatory purpose, McCarran-Ferguson refutes in the clearest possible terms petitioners' argument that the federal priority statute impairs or supersedes those codes.

ARGUMENT

I. REGULATION OF INSURANCE COMPANY INSOLVENCIES IS A TRADITIONAL AND EXCLUSIVE FUNCTION OF THE STATES

Enactment of the McCarran-Ferguson Act in 1945 did not represent a departure in the allocation of functions between state and federal governments in the area of insurance regulation. On the contrary, it recognized and sought to preserve the long-standing primacy of the

states in that area. State insurance regulation, moreover, was clearly understood to include regulation of insurance company insolvencies. Missouri's comprehensive insurance code, for example, was originally enacted in 1869, and included from the beginning a statutory framework for the liquidation of insolvent insurers. A federal court observed in 1938 that under the Missouri Insurance Code "[t]he object to be attained by the liquidation of an insolvent insurance company is the prompt, fair and equitable closing of an estate for the benefit of all creditors." *Pensinger v. Pacific States Life Ins. Co.*, 25 F. Supp. 295, 297 (E.D.Mo. 1938).

Winding up the affairs of insolvent insurers has long been recognized as an integral part of Missouri's insurance regulation. As the Missouri Supreme Court wrote in 1932, "[t]he original Code and amendments thereto indicate an intention to regulate the business of insurance from beginning to end, thereby protecting individual and public interests." *State v. Hall*, 52 S.W.2d 174, 177 (Mo. 1932). The Court also noted that Missouri's power "to authorize, supervise, regulate, *and liquidate* insurance companies rests on the interests of the public in the insurance business." *Id.* (emphasis added). *See also O'Malley v. Prudential Casualty & Surety Co.*, 230 Mo.App. 935, 80 S.W.2d 896, 897 (1935) (Missouri provides "an exclusive code for the insurance business including the course to be followed in the distribution of the assets of a dissolved company . . . and excluding the application of statutes which might seem . . . to be in conflict"); *Medallion Ins. Co. v. Wartenbee*, 568 S.W.2d 599, 601 (Mo.App. 1978) (same); *State ex rel. ISC Financial Corp. v. Kinder*, 684 S.W.2d 910, 913 (Mo.App. 1985) (Missouri statute "sets up a self-contained and exclusive scheme" for liquidation of insolvent insurance companies); *Melahn v. Continental Security Life Insurance Company*, 793 S.W.2d 425 (Mo.App. 1990) (Missouri Insurance Code is an exclusive code for the supervision of insurance companies).

Petitioners cite *United States v. Knott*, 298 U.S. 544 (1936), for the proposition that state insurance liquidation schemes have always been preempted by the federal priority statute. Pet. Br. 24. Contrary to petitioners' argument, however, that case did not involve preemption. The receivership in *Knott* was being conducted pursuant to New Jersey law, and neither the federal government nor any other party challenged the New Jersey receiver's assignment of priorities. The only question was whether certain assets the insolvent company had deposited with the Florida secretary of state as a condition of doing business in the state could be used by Florida for distribution to its own citizens or had remained property of the company available for distribution by the receiver. The Court held that the Florida statute, as previously construed by the Florida Supreme Court, merely created a general inchoate lien on the deposited assets, and that they therefore remained the property of the company and became part of the receivership estate. 298 U.S. at 552.

The subsequent history of the issue decided in *Knott* contradicts rather than supports petitioners' argument. In 1939 the National Association of Insurance Commissioners promulgated the Uniform Insurers Liquidation Act ("UILA"), and most states, including New Jersey, Florida and Missouri, have since adopted it. Section 7 of the UILA provides that assets deposited by insurers as a condition of doing business in a state, like those involved

in *Knott*, may be retained by the state for distribution in accordance with that state's law and are not considered part of the insolvent company's estate available for distribution by the receiver. If *Knott* had been a preemption case, the states' widespread adoption of that UILA provision, which reverses the result of *Knott*, would have been ineffective. It has never been held, however, and it appears never even to have been argued, that the federal priority statute overrides that provision of the UILA.

The Missouri Insurance Code since 1879 has included a priority scheme for the distribution of liquidated assets. Under that priority scheme, claims of the federal government are given the same priority as claims of the state government and local governments within the state. For over one hundred years there has been no suggestion that Missouri's priority scheme might be subject to the federal superpriority statute.

All fifty states have statutes comprehensively regulating the liquidation of insolvent insurance companies.[4] As one treatise noted:

---

[4] Ala. Code § 27-32-1, et seq.; Alaska Stat. § 21.78.010, et seq.; Ariz. Rev. Stat. Ann. § 20-611, et seq.; Ark. Code Ann. § 23-68-101, et seq.; Cal. Insurance Code § 980, et seq.; Colo. Rev. Stat. § 10-3-501, et seq.; Conn. Gen. Stat. Ann. § 38a-903, et seq.; Del. Code Ann tit. 18 § 5901, et seq.; Fla. Stat. ch. 631.001, et seq.; Ga. Code § 33-37-1, et seq.; Haw. Rev. Stat. Ann. § 431:15-101, et seq.; Idaho Code § 41-3301, et seq.; Ill. Ann. Stat. Ch. 73 para. 799, et seq.; Ind. Code Ann. § 27-9-1-1, et seq.; Iowa Code Ann. § 507C.1, et seq.; Kan. Stat. Ann. § 40-3601, et seq.; Ky. Rev. Stat. Ann. § 304.33-010, et seq.; La. Rev. Stat. Ann. § 22:731, et seq.; Me. Rev. Stat. Ann. tit. 24-A, § 4351, et seq.; Md. Code Ann., Insurance § 48A-132, et seq.; Mass. Gen. Laws Ann. ch. 175, § 180A, et seq.; Mich. Comp. Laws Ann. § 500.8101, et seq.; Minn. Stat. Ann. § 60B.01, et seq.; Miss. Code Ann. § 83-24-1, et

> "The state has an important and vital interest in the liquidation of an insolvent insurance company, and the contract of a policy holder of such a company is subject to the reasonable exercise of the state's police power in these respects. The only restriction on the exercise of the power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory."

2A Couch on Insurance 2d § 22.52.

Federal courts have traditionally respected the exclusive role of the states in the regulation of insurance company insolvencies. When insurance companies in Wisconsin filed suit in federal court challenging the constitutionality of state statutes governing the liquidation of insolvent insurers, the court abstained, stating:

> "the very exercise of federal jurisdiction will interrupt the state's efforts to effect its policy respecting the liquidation and rehabilitation of

---

seq.; Mo. Ann. Stat. § 375.1150, et seq.; Mont. Code Ann. § 33-2-1301, et seq.; Neb. Rev. Stat. § 44-4801, et seq.; Nev. Rev. Stat. § 696B.010, et seq.; N.H. Rev. Stat. Ann. § 402-C:1, et seq.; N.J. Rev. Stat. § 17:30C-1, et seq.; N.M. Stat. Ann. § 59A-41-1, et seq; N.Y. Insurance Law § 7401, et seq.; N.C. Gen. Stat. § 58-30-1, et seq.; N.D. Cent. Code § 26.1-06.1-01, et seq.; Ohio Rev. Code Ann. § 3903.01, et seq.; Okla. Stat. tit. 36 § 1901, et seq.; Or. Rev. Stat. § 734.010, et seq.; Pa. Stat. Ann. tit. 40 § 211, et seq.; R.I. Gen. Laws § 27-14-1, et seq.; S.C. Code Ann. § 38-27-10, et seq.; S.D. Codified Laws Ann. § 58-29B-1, et seq.; Tenn. Code Ann. § 56-9-101, et seq.; Tex. Insurance Code Ann. § 21.25, et seq.; Utah Code Ann. § 31A-27-101, et seq.; Vt. Stat. Ann. tit. 8 § 7031, et seq.; Va. Code Ann. § 38.2-1500, et seq.; Wash. Rev. Code Ann. § 48.31.010, et seq.; W. Va. Code § 33-10-1, et seq.; Wis. Stat. § 645.01, et seq.; Wyo. Stat. § 26-28-101, et seq.

> Wisconsin insurance companies and the concomitant protection of policyholders. . . . It is a matter of substantial state concern that the process of liquidating an insurance company be carried out in an orderly and efficient manner, so as to protect the interests of the company's owners, policyholders, and creditors, as well as the public."

Metropolitan Life Ins. Co. v. Board of Directors, 572 F. Supp. 460, 473 (W.D. Wisc. 1983). *See also Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980) (abstention would prevent duplication of effort and enable state to consolidate all claims against insolvent insurer); *Corcoran v. Ardra Ins. Co., Ltd.*, 657 F. Supp. 1223 (S.D.N.Y. 1987) (existence of a comprehensive state administrative framework is an important factor supporting federal abstention). As the court in *Metropolitan Life* further noted, "the orderly administration of justice and the prevention of unseemly conflicts between courts require . . . defer[ence] to the state courts . . . " 572 F. Supp. at 472.

Similarly, in *O'Neil v. Welch*, 245 F. 261 (3d Cir. 1917), the court recognized Pennsylvania's interest in regulating the business of insurance. The court noted the state's comprehensive administrative scheme involving the examination, regulation and dissolution of insurance companies.[5] It rejected federal intervention as

[5] "In assuming this function the State has defined rights conferred upon insurance companies and rights reserved to itself, imposed duties and prescribed remedies. In conferring upon insurance companies incorporated under its laws the right to solicit business from the public, it imposed upon them the

counterproductive, infringing on the state's exclusive authority in this area: "Thus the policy of the State would be thwarted and its administration overthrown." *Id.* at 268. *See also Superintendent of Ins. v. Bankers Life & Cas. Co.*, 401 F. Supp. 640 (S.D.N.Y. 1975) (management and liquidation of insolvent insurers is an exclusive state interest).

A common theme found in the authorities upholding the states' exclusive role in regulating insurance company insolvencies is emphasis on the states' interest in protecting policyholders and the public. In serving that interest, every state has included in its insurance code provisions regulating insurance company insolvencies. More than 40 states have specific provisions that assign priorities for policyholders and the federal government, among other claimants.[6] Some states, like Florida and New Jersey, give

duty to be solvent and to conduct their business honestly, and reserved to itself the right to inquire both as to their solvency and business conduct, and when necessary to stay their business and end their existence." *O'Neil*, 245 F. at 267.

[6] Alaska Stat. § 21.78.260; Ariz. Rev. Stat. Ann. § 20-629; Ark. Code Ann. § 23-68-126; Cal. Insurance Code § 1033; Colo. Rev. Stat. § 10-3-507; Conn. Gen. Stat. Ann. § 38a- 944; Fla. Stat. ch. 631.271; Ga. Code § 33-37-41; Haw. Rev. Stat. Ann. § 431:15-332; Idaho Code § 41-3342; Ill. Ann. Stat. Ch. 73 para. 817; Ind. Code Ann. § 27-9-3-40; Iowa Code Ann. § 507C.42; Kan. Stat. Ann. § 40-3601(a)(2); Ky. Rev. Stat. Ann. § 304.33-430; Me. Rev. Stat. Ann. tit. 24-A, § 4379(5); Mass. Gen. Laws Ann. ch. 175, § 180F(3); Mich. Comp. Laws Ann. § 500.8142(e); Minn. Stat. Ann. § 60B.44; Miss. Code Ann. § 83-24-83(3) & (5); Mo. Ann. Stat. § 375.1218; Mont. Code Ann. § 33-2-1371(5); Neb. Rev. Stat. § 44-4842(3); Nev. Rev. Stat. § 696B.420; N.H. Rev. Stat. Ann. § 402-C:44; N.J. Rev. Stat. § 17:30C-26(c); N.M. Stat. Ann.

the federal government priority over policyholders, while others, like Connecticut and Arizona, prefer policyholders.[7] None give the federal government the absolute priority claimed by petitioners in this case. Thus the states have recognized and assumed the responsibility of regulating insurance company receiverships as an integral and inseparable part of the business of insurance, and most of them have viewed the assignment of priorities as an integral part of that regulation.[8]

---

§ 59A-41-49(E); N.D. Cent. Code § 26.1-06.1(3)(5); Ohio Rev. Code Ann. § 3903.42(E); Or. Rev. Stat. § 734.360; Pa. Stat. Ann. tit. 40 § 221.44; R.I. Gen. Laws § 27-14-22(C); S.C. Code Ann. § 38-27-610(5); S.D. Codified Laws Ann. § 58-29B-124(5); Tenn. Code Ann. § 56-9-330(3); Utah Code Ann. § 31A-27-335(5); Vt. Stat. Ann. tit. 8 § 7081(3) & (5); Va. Code Ann. § 38.2-1509; Wash. Rev. Code Ann. § 48.31.280(c); W. Va. Code § 33-10-19a(6)(c)(e); Wyo. Stat. § 26-28-125.

[7] The Transit receivership is governed by the priority scheme that was in effect at the time Transit was declared insolvent. R.S.Mo. § 375.700. That scheme assigns second priority (behind administrative expenses) to claims by the federal government, the state of Missouri and local governments within the state. Policyholders are assigned third priority. In 1991, Missouri adopted the priority scheme of the NAIC Insurers' Supervision, Rehabilitation, and Liquidation Model Act, under which policyholder claims and some governmental claims share second priority and other governmental claims are assigned fifth priority. R.S.Mo. § 375.1218.

[8] Kimball, History and Development of the Laws of State Insurer Insolvency Proceedings: An Overview, Law and Practice of Insurance Company Insolvency 1986 ABA Sec. Tort & Ins. Prac. 10. "Congress decided to leave insurance regulation basically to the states, and implemented its decision by the McCarran-Ferguson Act. It was natural, therefore, that the states should continue as they did to develop the law of insurance company liquidation." *Id.* at 17.

II. THE BUSINESS OF INSURANCE INCLUDES THE LIQUIDATION OF INSOLVENT INSURANCE COMPANIES

The widespread adoption by the states of insurance codes that include regulation of insurance company insolvencies is not, as petitioners' argument implies, a case of overreaching. Rather it reflects the states' recognition that regulation of the performance of insurance contracts cannot be sensibly separated from regulation of their content. If the state is to regulate the obligations insurance companies incur when they enter into insurance contracts, it must also be allowed to regulate the performance of those obligations, whether that performance takes place before or after insolvency.

Only by the most extraordinarily narrow interpretation of the term could it be said that the business of insurance includes only the issuance of policies and not the payment of claims. Such a narrow interpretation was in fact adopted by this Court in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), when it held that the business of insurance was a purely local activity and therefore not subject to federal regulation as interstate commerce. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), however, the Court overruled *Paul*, holding that the business of insurance includes not only the issuance of the policy but also "negotiations and events prior to execution of the contracts and *the innumerable transactions necessary to performance of the contracts*". *Id.* at 537 (emphasis added).

After *South-Eastern Underwriters*, Congress enacted the McCarran-Ferguson Act, leaving the business of

insurance to the exclusive regulation of the states. Construing that statute in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), this Court noted that the "business of insurance" was a narrower concept than the business of insurance companies, and held that McCarran-Ferguson exempts only the former from federal regulation. In defining the "business of insurance" for that purpose, it adhered to the view expressed in *South-Eastern Underwriters* that the "core" of that business included not only the issuance of policies but also their "reliability, interpretation *and enforcement*". *Id.* at 460 (emphasis added). The Court quoted that definition with approval in both *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 215-16 (1979), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 128 (1982).

Petitioners' argument that the states' exclusive role in regulating the "business of insurance" is limited to the time of the policies' issuance (Pet. Br. 18-19) is thus contrary not only to the logic of the public policy underlying state regulation of insurance but also to the language of this Court's opinions. The state regulation at issue in this case is not of insurance company acquisitions and mergers, as in *National Securities*, nor of agreements ancillary to the discharge of the insurance company's obligations, as in *Royal Drug* (agreements with pharmaceutical providers) and *Pireno* (agreements with peer review organizations participating in the review and adjustment of claims). The regulation in this case is of the performance of the insurance contract itself, an activity that is the essence of the business of insurance. Insurance would still be insurance without either provider agreements or

peer review. The insurance contract would be meaningless, however, without the insurer's performance of its obligation to pay valid claims. *See Pireno*, 458 U.S. at 137 (Rehnquist, J., dissenting) ("Few insurance company matters could be of greater importance to policyholders than whether their claims will be paid").

Petitioners argue (Pet. Br. 14-15) that receivers are not in the business of insurance because they do not issue policies. It does not follow, however, from the fact that receivers do not engage in *all* aspects of the business of insurance that they do not engage in the business of insurance at all. Even insurance companies that are not in receivership sometimes stop issuing policies; Transit itself stopped issuing policies almost a year before it was declared insolvent. Such companies do not thereby stop engaging in the business of insurance and they do not stop being subject to state insurance regulation.[9]

Petitioners do not deny that a receiver steps into the shoes of the insolvent company, assuming all the company's rights and obligations. 2A Couch on Insurance 2d § 22:45; UILA §§ 2(2), 3(2); *see Relfe v. Rundle*, 103 U.S. 222, 224 (1880) (the Missouri Insurance Code giving the receiver control of the insolvent company's property "was, in legal effect, part of the charter of the corporation"). Among the rights and obligations assumed by the receiver of an insurance company are those arising directly from its contracts of insurance, including the

[9] The Missouri Insurance Code expressly provides that "[t]he liquidation of any insurer shall be considered to be the business of insurance for purposes of application of any law of this state." R.S.Mo. § 375.1176.1.

right to receive unpaid premiums and the obligation to pay covered claims. Under any reasonable construction of the term, the receiver is engaged in the business of insurance when he enforces those rights and performs those obligations.[10]

Petitioners miss the point entirely when they suggest (Pet. Br. 7-8) that receivers are not in the business of insurance because the risk of the insurer's insolvency is not part of the risk transferred by the insurance policy. The business of insurance that is regulated by the insolvency provisions of state insurance codes is not insurance against insolvency; it is the insurance afforded by the insolvent company's policies. Those policies, issued before insolvency, transferred risk from the policyholders to the company, and the state insurance codes regulate the payment (both before and after insolvency) of losses covered by those policies. In doing so, they regulate the business of insurance.[11]

Petitioners make a similar mistake when they point out (Pet. Br. 18) that the Ohio statute (as distinct from the

[10] Petitioners concede that receivers "may continue to engage in aspects of the business of insurance during the liquidation" (Pet. Br. 15 n. 5) but do not concede the logical corollary: that when they do so (as when they adjust, prioritize and pay policyholders' claims) McCarran-Ferguson leaves them answerable only to state law.

[11] All of Transit's reinsurance treaties, which represent a substantial portion of the assets available to the Receiver, include clauses contemplating the continuation of the business of insurance by the receiver in the event of Transit's insolvency.

insurance policies it regulates) does not result in any transfer of risk. The question, of course, is not whether the state law *is* the business of insurance but whether it *regulates* that business. The insolvent company was engaged in the business of insurance before insolvency; the receiver is engaged in that business after insolvency to the extent it is necessary to wind up the affairs of the company; and the state law regulates both the company and the receiver in their conduct of that business. McCarran-Ferguson provides that that regulation is exclusive and may not be "invalidate[d], impair[ed] or supersede[d]" by any act of Congress.

Petitioners' attempt to draw a dispositive distinction between regulation of the obligations contained in insurance policies and regulation of the performance of those obligations, and their further attempt to draw a distinction between the performance of those obligations by solvent and insolvent companies, rest on no principled foundation and ignore the realities of the insurance business and insurance company liquidations. States could not effectively regulate the business of insurance if their exclusive power to do so did not encompass liquidations as well as other aspects of the business.

III. THE McCARRAN-FERGUSON ACT CONFIRMED THE STATES' EXCLUSIVE ROLE IN THE REGULATION OF THE BUSINESS OF INSURANCE

By declaring the business of insurance to be interstate commerce, *South-Eastern Underwriters* made possible

the application to the insurance industry of federal legislation based on the commerce clause.[12] Congress acted swiftly, however, not only to disavow any intent to take over the states' traditional role in insurance regulation, but also to provide that no existing federal statute should interfere with the states' exclusive role in that regard. Thus the McCarran-Ferguson Act provided not only that "the business of insurance . . . shall be subject to the laws of the several states which relate to the regulation . . . of such business" but also that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

There can be no question that the insurance codes of Ohio, Missouri and other states are laws "enacted . . . for the purpose of regulating the business of insurance." The plain language of McCarran-Ferguson, therefore, refutes petitioners' argument that the federal priority statute, or any other federal statute, should be held to "invalidate, impair or supersede" any part of those codes. It would be difficult, indeed, to imagine language more clearly designed to express Congress's intent that state laws *not* be preempted.

Even if there were no McCarran-Ferguson Act, of course, it would not follow that Congress intended to preempt state insurance codes when it enacted the federal

[12] Because the federal priority statute was not enacted pursuant to the commerce power, *South-Eastern Underwriters* did not affect federal power in that area.

priority statute. Petitioners would still bear a heavy burden of showing a clear statement of such intent by Congress.[13] McCarran-Ferguson simply makes it unnecessary to speculate about the intent of a Congress that sat two hundred years ago, when it is most likely that it had no intent one way or the other regarding state insurance codes that at that time were not even in existence.

There is no issue in this case regarding the extent to which McCarran-Ferguson may provide an exemption from the federal antitrust laws. There is no occasion, therefore, to invoke the well-settled rule that such exemptions are narrowly construed, a rule that was the starting point for this Court's analysis in both *Royal Drug*, 440 U.S. at 231, and *Pireno*, 458 U.S. at 126. Application of that rule in this case, moreover, would in effect reverse the presumption *against* federal preemption of state law that is a fundamental part of this country's constitutional doctrine.

It would be particularly inappropriate to adopt a narrow construction of McCarran-Ferguson's language when the effect of that construction would be not to give full scope to a federal regulatory scheme (as in *Royal Drug* and *Pireno*) but to create federally mandated exemptions from regulatory schemes adopted by the states. The preemption urged by petitioners in this case is not preemption by a federal regulatory scheme, because the federal government has never attempted to regulate insurance company insolvencies or any other aspect of the insurance business. Instead, petitioners argue that a federal statute of

[13] See note 3, *supra*.

general application should be applied to the specific case of insurance company receiverships in such a way as to override a particular provision of the state's insurance code. That kind of preemption would not mean the replacement of state regulatory schemes by a federal one; it would mean the creation of piecemeal exceptions, mandated by federal statutes enacted with no consideration of their impact on the business of insurance, to otherwise comprehensive and self-contained systems of regulation in virtually every state. Such exceptions would undermine the integrity of state regulatory systems in an area where not only is there no substitute system of federal regulation but where a federal statute exists expressly leaving regulation to the states. It is very unlikely, especially in light of the express provisions of McCarran-Ferguson, that Congress intended such a result.[14]

The relevance of the McCarran-Ferguson Act to this case, therefore, is not that it provides an exemption from a

---

[14] Congress is currently reviewing legislation that would authorize limited federal regulation in the area of insurance company insolvency. H.R. 4900, 102d Cong., 2d Sess. (1992). The legislation, entitled the "Federal Insurance Insolvency Act of 1992," was introduced in this Congress by Rep. John Dingell (D-Mich.), chairman of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce. A report by that subcommittee in the last Congress noted that "[u]nder the present regulatory framework, state insurance departments are responsible for regulating insurance company solvency, and administering the liquidation of insolvent companies." Failed Promises 72. Thus the responsible congressional oversight committee agrees with the states that the regulation of insurance company insolvencies is part of the "business of insurance" regulated exclusively by the states. Until Congress acts to amend the law, it should remain that way.

federal regulatory scheme but rather that it expresses Congress's intent on the underlying preemption question. So viewed, there can be little doubt that it makes the usual heavy presumption against federal preemption of state law virtually conclusive in the area of insurance regulation. Far from having clearly stated an intent to preempt state law in the area of insurance regulation, Congress by enacting McCarran-Ferguson clearly stated the opposite intent: to leave state law supreme. Petitioners' position, which is directly contrary to that clearly stated intent, should be rejected.

CONCLUSION

For the reasons stated herein, the judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

THOMAS W. MCCARTHY, III
JAMES C. OWEN
MCCARTHY, LEONARD,
KAEMMERER, OWEN,
LADERMAN & LAMKIN
16141 North Outer
40 Drive, Suite 300
Chesterfield, MO 63017

*W. DENNIS CROSS
BRUCE E. BATY
MORRISON & HECKER
2600 Grand Ave.
Kansas City, MO 64108
(816) 691-2600

*Counsel of Record